Supreme Court, U.S.
FILED
081468 MAY 27 2009
OFFICE OF THE CLERK

No. 08-1

In The

Supreme Court of the United States

ANN C. DONOVAN,

Petitioner,

v.

STARK LIGON, EXECUTIVE DIRECTOR, ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

ROBERT R. ESTES
Attorney at Law
One East Center St., Ste. 200
Fayetteville, AR 72701-5302
Tel. (479) 521-4900
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

DO FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS PROHIBIT A STATE FROM SUSPENDING AN ATTORNEY'S LAW LICENSE WITHOUT SERVICE OF PROCESS CARRIED OUT IN A MANNER TO ENSURE RECEIPT OF THE SUMMONS AND COMPLAINT?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Ann C. Donovan, Petitioner, who is a citizen and resident of the State of Arkansas, and Stark Ligon, Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, which is an agency of the State of Arkansas, Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Ann C. Donovan respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The Opinion of the Arkansas Supreme Court of which Petitioner seeks review is *Donovan v. Supreme Court Committee on Professional Conduct*, ___ S.W.3d ___, 2009 WL 102731 (Ark. 2-26-09, *reh'g denied,* 2009 WL 102731 (Ark. 2-26-09), a final order from which comes this appeal. The Mandate, filed February 26, 2009, **App. 13,** affirmed Respondent's suspension order and denied Petitioner's Petition for Writ of Mandamus. There was a typographical error in the Court's original rehearing denial letter. **App. 15.** The letter is erroneously dated January 26, 2009, **App. 15,** but the correct date was February 26, 2009. *See* the Court's web site: http://courts.state.ar.us/dockets/docket_info.cfm?case_number=%2008-804.

The Arkansas court's final order brings the Petitioner before this Court. This is because the Arkansas Supreme Court's ruling has affirmed a suspension of Petitioner's law license without necessity of showing service of process of the summons and complaint upon her and without taking additional action after they were returned "unclaimed", twice. The Respondent rendered judgment by default and denied Petitioner an opportunity to respond or have a hearing.

The lower limits of procedural due process are unclear absent clarification by this Court of *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). In addition, this ruling impacts not only the Petitioner but others in state judicial systems.

This case is apparently one of first impression as no reported decision has been found which addressed attorney disciplinary service requirements under *Jones v. Flowers, supra,* when the state has notice that a summons and complaint were returned unclaimed.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas denied a requested rehearing on the specific issue of whether service of a summons and complaint without proof of service violated federal constitutional due process guarantees. The court's decision denying rehearing was entered on February 26, 2009. **App. 13, 15.** The jurisdiction of this Court rests upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give

judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

U.S. Const. amend. XIV:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Procedures Regulating Professional Conduct, Rule 9:

"A. Service of Complaint.

"(1) Furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address. Certified mailing of the formal complaint to said address shall be deemed a waiver of confidentiality for purposes of Section 9(A)(2)(c).

"(2) Service may be effected on a respondent attorney by:

"(a) Mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail; or,

"(b) Personal service as provided by the Arkansas Rules of Civil Procedure or by an Investigator with the Office of Professional Conduct; or,

"(c) When reasonable attempts to accomplish service by Section 9(A)(2)(a) or Section 9(A)(2)(b) have been unsuccessful, then a warning order, in such form as prescribed by the Committee, shall be published weekly for two consecutive weeks in a newspaper of general circulation within this State or within the locale of the attorney's address of record. In addition, a copy of the formal complaint and warning order shall be sent to the respondent attorney's address of record by regular mail.

"(3) An attorney's failure to provide an accurate, current mailing address to the Clerk as required by Section 9(A)(1), or the failure or refusal to receipt certified mailing of a formal complaint, shall be deemed a waiver of confidentiality for the purposes of the issuance of a warning order.

"(4) Unless good cause is shown for an attorney's non-receipt of a certified mailing of a formal complaint, the attorney shall be liable for the actual costs and expenses for service or the attempted service of a formal complaint, to include all expenses associated with the effectuation of service. Such sums

will be due and payable to the Committee before any response to a formal complaint will be accepted or considered by the Committee.

"(5) After service has been effected by any of the aforementioned means, subsequent mailings by the Committee to the respondent attorney may be by regular mail to the attorney's address of record, address at which service was accomplished, or to such address as may have been furnished by the attorney, as the appropriate circumstances may dictate, except that notices of hearings ad letters of caution, reprimand, suspension or initiation of disbarment proceedings shall also be sent by certified, return receipt mail.

. . . .

"(B) Time and Manner of Response.

"(1) Upon service of a formal complaint, pursuant to Section 9(A)(2)(a) or Section 9(A)(2)(b), or the date of the first publication, pursuant to Section 9(A)(2)(c), the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director, except when service is upon a nonresident of this State, in which event the attorney shall have thirty (30) days within which to file a response. In the event that the Executive Director has not received a response within twenty (20) days or within thirty (30) days, as the appropriate case may be, following the date of service, and an

extension of time has not been granted, the Executive Director shall proceed to issue ballots as provided in Section 10.

"(2) At the request of an attorney, the Executive Director is authorized to grant an extension of a reasonable length for the filing of a response. Subsequent requests for extension must be in written form and will be ruled on by the Chairperson of the Committee, or the chair of the panel to which the matter has been assigned.

"(3) The Executive Director shall provide a copy of the attorney's response to the complainant within ten (10) days of receiving it and advise that the complaint has seven (7) days in which to rebut or refute any allegations or information contained in the attorney's response. The Executive Director may include any rebuttal made by the complainant as a part of the material submitted to the Committee for decision and any such rebuttal shall be provided to the respondent attorney for informational purposes only, with no response required. If rebuttal to be submitted to the Committee contains allegations of violation of the Model Rules not previously alleged, it shall be in the form of a supplemental affidavit of complaint and the respondent attorney shall be provided a copy and permitted surrebuttal in the manner prescribed in subsection B(1) of this Section, except the time for doing so shall be ten (10) days.

"(4) The calculation of the time limitations specified in Section 9(B) shall commence on the day following service upon the respondent. If the due date of a response or surrebuttal falls on a Saturday, Sunday, or legal holiday, the due date will be extended to the next regular business day."

STATEMENT OF THE CASE

Petitioner Ann C. Donovan was charged by summons and complaint by Respondent, Arkansas Supreme Court Committee on Professional Conduct, with violation of state ethics rules concerning her representation of debtors in bankruptcy, with purported inaccuracies in schedules, a failure to amend the schedules and lack of communication with her clients, after a United States Bankruptcy Court judge made a judicial referral. **R. 1, Add. 1, R. 6, Add. 6, R. 15, Add. 15.** The Respondent attempted to serve the summons dated August 28, 2007 and complaint, **R. 1, Add. 1, R. 6, Add. 6,** by certified mail, return receipt, restricted delivery, yet no green card was returned, and there was no proof of service of the initial summons and complaint. They were returned "unclaimed", **R. 84.** The Respondent mailed a second summons dated September 21, 2007 and complaint. **R. 85, Add. 47.** The second green card was never returned.

A United States Postal Service web site, "track and confirm", indicated the second summons and

complaint were "delivered" on October 11, 2007. It did not indicate to whom they were "delivered", and there was no signature. **R. 90, Add. 52.**

Petitioner, despite never having service upon her, became aware of the complaint and summons and requested an extension of time to file a response. **R. 91, Add. 53.** Respondent's executive director replied that since the "track and confirm" postal site indicated that "you obtained the mailing from the post office", she was deemed to have waived a right to be heard in writing or have a hearing. **R. 92, Add. 54.**

Respondent's Findings and Order held the Petitioner waived her right to a hearing, and the allegations in Respondent's complaint were deemed admitted against her. **R. 94, Add. 56.** Respondent suspended Petitioner's law license and ordered her to pay $1,400.00 in monetary sanctions. *Id.*

Petitioner filed a Petition for Reconsideration, **R. 101, Add. 62,** and her Additional Petition for Reconsideration or in the alternative Request For *De Novo* Hearing, **R. 214, Add. 145,** which were denied. She then filed an appeal to the state's highest court, raising a lack of jurisdiction, Brief, **Arg. 2, 6, 8,** and violation of her constitutional rights to due process guaranteed by the Fourteenth Amendment to the United States Constitution. Brief, **Arg. 4, 5, 6, 7, 16.** Petition for Rehearing and Brief in Support, **pp. 2, 3, 4, 8, 9, 10.**

The Arkansas court held that there was no requirement of proof of receipt of the summons and

complaint under the Respondent's rule, Opinion, 2009 WL 102731, at 3, notwithstanding that Respondent's Rule, 9(A)(2)(a), expressly mentioned sending the documents by "certified, restricted delivery, return receipt mail." Petitioner cited *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1225-26, 20 L. Ed. 2d 117, 122 (1968), and other federal court decisions. The court did not expressly address the Petitioner's federal due process challenges but implicitly denied them. *Id., reh'g denied,* 2009 WL 102731 (Ark. 2-26-09).

This Petition for a Writ of Certiorari brings before the Court the lower limits of due process that may be acceptable in light of the Court's previous pronouncement in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). In *Jones*, the Court reasoned that the Arkansas practice of taking no additional action after a summons and complaint were returned unclaimed was insufficient but left it to the state to decide what additional action was necessary. In this case, the Respondent chose to accept a "delivered" comment on a web site, without showing to whom delivered, or requiring proof of signature.

The appeal in this case is from the highest court in a state judicial system and raises profound issues involving the federal constitutional guarantees involving procedural due process under the Fourteenth Amendment. Petitioner seeks this Court's certiorari under 28 U.S.C. § 1257(a), on the grounds in Supreme Court Rule 10(b) and (c), since Arkansas'

decision violates federal procedural due process guaranteed by the Fourteenth Amendment and conflicts with holdings of this Court and others.

REASONS FOR GRANTING THE PETITION

THE FOURTEENTH AMENDMENT GUARANTEES OF DUE PROCESS FORBID A STATE TO DENY ONE AN OPPORTUNITY TO RESPOND AND HAVE A HEARING WHEN A COMPLAINT AND SUMMONS ARE IMPROPERLY SERVED AS DUE PROCESS IS NOT SATISFIED BY MERE ALLEGATIONS OF DELIVERY.

A. THIS COURT HAS RECOGNIZED THAT A LAW LICENSE ENTAILS A PROPERTY INTEREST WHICH IS GUARANTEED PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The reason that this Court should grant certiorari in this case is that it brings before the Court the question of whether a state must take additional action before suspending an attorney's law license when the state has notice that the summons and complaint were returned "unclaimed". This is an issue which the state courts continue to struggle with even after the Court's ruling in *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). Before reaching the question of whether one is entitled to due process, the Court must find that the ability to practice law is a property right under the

Fourteenth Amendment. The United States Supreme Court has addressed the property interests in an occupational license:

> "Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."

Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90, 94 (1971).

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 105 S. Ct. 1487, 1494, 84 L. Ed. 2d 494, 504 (1985), the Court wrote, "We have frequently recognized the severity of depriving a person of the means of livelihood."

Minimal procedural due process has likewise been recognized as necessarily providing an opportunity to be heard prior to deprivation of property interests. *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1225-26, 20 L. Ed. 2d 117, 122 (1968) (recognizing an attorney has a right to procedural due process in a disciplinary proceeding). *See also Boddie v. Connecticut*, 401 U.S. 371, 378-79, 91 S. Ct. 780, 786-87, 28 L. Ed. 2d 113, 119 (1971) ("[A] state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due

Process Clause."); *see generally Ex Parte Bradley*, 74 U.S. 364, 375, 19 L. Ed. 214, 218, 7 Wall. 364 (1868); *Selling v. Radford*, 243 U.S. 46, 48, 37 S. Ct. 377, 377-78, 61 L. Ed. 585, 586 (1917); *Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 2649, 61 L. Ed. 2d 364, 374 (1979).

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," noted the Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796, 801 (1975).

The Court recognized in *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976), that it will examine three factors to determine if a property interest requires due process, namely:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id.

This Court has extended the right to a procedurally significant hearing in a variety of factual situations, as noted in *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589, 29 L. Ed. 2d 90, 94 (1971).

The Court in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796, 802 (1957), noted one cannot be excluded from the practice of law absent proper reason. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281, 105 S. Ct. 1272, 1277, 84 L. Ed. 2d 205, 211 (1985), characterized the ability to be licensed to practice law was a "fundamental right". *Id.*

The question of whether an attorney was entitled to due process concerning their law license was addressed *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117, 122 (1968), *reh'g denied*, 391 U.S. 961, 88 S. Ct. 1833, 20 L. Ed. 2d 874, noting that disciplinary proceedings against counsel were "quasi-criminal" and that an attorney was entitled to procedural due process.

The federal courts have followed suit, allowing due process procedurally. *E.g., Mattox v. Disciplinary Panel of the United States District Court*, 758 F. 2d 1362, 1366 (10th Cir. 1985) (noting the practice of law is "not a matter of grace or favor" and characterizing it as a "fundamental right", citing this Court's opinions). As noted in *Randall v. Brigham*, 74 U.S. 523, 540, 19 L. Ed. 285, 293, 7 Wall. 523 (1868), notice must be given to the attorney with an opportunity "for explanation and defense." *See In re Ruffalo*, 390

U.S. at 551, 88 S. Ct. at 1226, 20 L. Ed. 2d at 122. State courts follow pronouncements of this Court. *E.g., Statewide Grievance Committee v. Botwick*, 627 A. 2d 901 (Conn. 1993) (noting law license requires due process before suspension).

Even the cases in a lower court or administrative proceeding require due process. They should not be looked on differently in that respect. In 1968, in an opinion written by Chief Justice Warren, the Court explained why constitutional due process guarantees should apply to all sorts or proceedings, from the lowest criminal case to others:

> "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process – in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be utterly remediless and defenseless against repetitions of unconstitutional conduct."

Sibron v. New York, 392 U.S. 40, 53-54, 88 S. Ct. 1889, 1897-98, 20 L. Ed. 2d 917, 929 (1968).

In this case, the Petitioner's law license has been suspended denying her livelihood and resulting collateral consequences to her life which will endure long after the suspension is lifted. Numerous cases have noted that ramifications of disciplinary proceedings endure. *E.g., Bloom v. Illinois*, 391 U.S. 194, 88

S. Ct. 1477, 20 L. Ed. 2d 522 (1968), *United States v. Schrimsher*, 493 F. 2d 842 (5th Cir. 1974).

Disciplinary actions against an attorney have wide reaching consequences as noted in 7A *Federal Procedure, Lawyers Edition*, 'Mootness', § 7.51 (2008):

> "As attorney's conviction of criminal contempt may have particularly serious ongoing consequences, so as to preclude an appeal from being considered moot, if the conviction may: (1) provide a basis for disciplinary action by a bar association; (2) foreclose opportunities for appointment or election to public office; or (3) do damage to the attorney's practice and his or her reputation in the legal community."

Petitioner, Ann C. Donovan, has a property interest in her law license, and it may not be suspended absent procedural due process under the guarantees of the Fourteenth Amendment.

B. THIS CASE RAISES A SIGNIFICANT ISSUE: MUST A STATE TAKE ADDITIONAL ACTION BEFORE SUSPENDING AN ATTORNEY'S LAW LICENSE WHEN THE STATE HAS NOTICE THAT THE SUMMONS AND COMPLAINT WERE RETURNED UNCLAIMED?

The extent to which one is entitled to due process was addressed by the Court in an earlier case arising from Arkansas, *Jones v. Flowers*, 547 U.S. 220, 126

S. Ct. 1708, 164 L. Ed. 2d 415 (2006). There, the Court ruled that once notice was returned as undeliverable, the state was obligated to take additional reasonable steps to provide notice. In that case, the State simply sent another notice by certified mail which was also returned. That is exactly what Respondent did here. This case is apparently one of first impression as no reported decision has been found which has addressed attorney disciplinary service requirements under *Jones v. Flowers, supra,* when the state has notice that a summons and complaint were returned unclaimed.

Respondent sent a first notice, returned as "unclaimed", and then sent a second in the identical manner, which did not result in return of a signed receipt of service. The State then relied upon not another mailing or personal service but a postal web site notation showing "delivered". **R. 90, Add. 52.** To whom something was delivered, if anyone, is only a guess.

Jones v. Flowers, supra, requires more than mailing of "unclaimed" letters if practicable to do so. A fair reading of the Arkansas Procedures Regulating Professional Conduct, Rule 9(2)(b) and (c) not only find it is practicable, but requires further attempts at service as set out in the rule itself.

Respondent took no further steps but found the Petitioner had waived her right to respond and had "extinguished" her right to a hearing. **R. 92, Add. 54.** Respondent entered a default against Petitioner and

suspended her law license as well as imposed a monetary sanction. **R. 94, Add. 56.**

This Court has observed the necessity of proper service of process, in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347, 119 S. Ct. 1322, 1325, 143 L. Ed. 2d 448, 455 (1999), where it was characterized as a "bedrock" principle, noting that receipt did not excuse failure of formal service. *See also Omni Capital International, Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 97, 104, 108 S. Ct. 404, 409, 98 L. Ed. 2d 415, 423 (1987).

Utah considered a case where the state bar suspended an attorney's license after an "unclaimed" letter was returned in the mail, by *In re Discipline of Sonnenreich*, 86 P. 3d 712 (2004). The state's high court reasoned this was insufficient notice prior to suspending her license, observing that it had addressed service requirements earlier, and those mandated more. Utah's constitutional guarantee of due process is substantially the same as the due process guarantees contained in the Fifth and Fourteenth amendments to the United States Constitution.

> "In considering this issue, we look to our decision in *In re Discipline of Schwenke*, 849 P. 2d 573 (Utah 1993) *Schwenke* involved a petition to disbar attorney Schwenke from the practice of law . . . In that case Schwenke failed to appear at an order-to-show-cause hearing before the district court, we suspended

> him for thirty days on recommendation from the Bar . . . The order was sent via certified mail to Schwenke's business address and received by his receptionist . . . When Schwenke subsequently continued to practice during the thirty-day suspension, a special master recommended that Schwenke be disbarred . . . In rejecting the special master's recommendation, we noted 'grave concern[s] about the irregularities in [the] proceedings' . . . We stated:
>
> 'Significant licensing procedures are in place to assure that only qualified attorneys are admitted to the practice of law in this state. We think that suspension and disbarment proceedings call for adherence to minimum requirements of due process, including notice of hearing and notice that the attorney's license has been restricted or withdrawn. We therefore hold that service by certified or registered mail must be on the attorney *personally* and cannot be accomplished by delivery to a common area receptionist at the attorneys office. We acknowledge that actual personal service will often be required when service by mail is ineffectual. However, in suspension or disbarment proceedings, *actual notice is essential.*'"

Id. at 723 (citations omitted) (emphasis in original).

In *Yi Tu v. National Transportation Safety Board*, 470 F. 3d 941 (9th Cir. 2006), an agency's letters were returned as "refused". The Ninth Circuit reasoned this denied due process, writing:

> "The FAA denied Tu due process by not providing him with adequate notice of the suspension orders. It thereby denied Tu the opportunity to file a timely appeal. The lack of appeal led to the suspension of his pilot's license, an essential to his business as a pilot.
>
> "Due process does not require the FAA to provide a pilot with actual notice before taking adverse action with respect to his or her pilot's license. *See Jones*, 126 S. Ct. at 1713. Due process, however, does require notice reasonably calculated, under all the circumstances, to provide a pilot notice of an adverse action related to his or her pilot's license, thereby, affirming the pilot an opportunity to present objections or appeal. Id. at 1714.
>
> " . . . [W]here mailed notice is returned unclaimed, the government must take additional steps to insure notice, if it is practicable to do so. Id. at 1713."

Id. at 944-45.

This case brings before the Court the question of the lower limits of required due process before an attorney's license is suspended when the State is aware its certified mail was returned, applying *Jones v. Flowers*. This Court should grant the Petition for Certiorari.

CONCLUSION

It is for these reasons the Petitioner respectfully requests her Petition for a writ of certiorari be granted.

Respectfully submitted,

ROBERT R. ESTES
Attorney at Law
One East Center St., Ste. 200
Fayetteville, AR 72701-5302
Tel. (479) 521-4900
Attorney for Petitioner

SUPREME COURT OF ARKANSAS
No. 08-804

ANN C. DONOVAN, APPELLANT, VS. SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, APPELLEE,	**Opinion Delivered** 1-15-09 APPEAL FROM THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT PANEL A AFFIRMED PETITION FOR WRIT OF MANDAMUS DENIED.

ROBERT L. BROWN, Associate Justice

This matter is an appeal by appellant Ann Donovan from the Findings and Order of Panel A of the appellee Arkansas Supreme Court Committee on Professional Conduct ("Committee"), suspending Donovan's license to practice law for twelve months, reprimanding her, requiring her to pay restitution to her clients, and assessing costs. We affirm the Findings and Order of Panel A.[1]

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[1] According to the Procedures Regulating Professional Conduct, the Committee shall consist of two separate seven-member panels. Ark. R. Regulating Prof'l Conduct § 3(A)(1) (2008). In this opinion, "Committee" refers to the Committee as a whole. Panel A is the specific seven-member panel of the Committee that decided Donovan's case.

Ann Donovan has been licensed to practice law in Arkansas since 1978. In 2005, she filed a bankruptcy action on behalf of William and Viola Parks, and as a result of that representation, the bankruptcy judge, Richard Taylor, referred her to the Committee for disciplinary action. The allegations by Judge Taylor were that Donovan had filed inaccurate schedules and petitions in the Parks bankruptcy matter, that she took no action for over a year after she was asked to correct the mistakes, and that she failed to communicate adequately with her clients and the bankruptcy trustee.

The Committee sent a formal complaint to Donovan, dated August 28, 2007. The complaint was sent to Donovan's address of record by certified, restricted delivery, return receipt mail. The complaint was returned unclaimed. On September 21, 2007, the Committee resent the formal complaint, again by certified, restricted delivery, return receipt mail. The Track & Confirm system of the United States Postal Service showed that the complaint was delivered at 8:24 a.m. on October 11, 2007. Donovan contends that she did not receive the complaint until she picked it up at the post office on October 16, 2007.[2]

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[2] On appeal, Donovan asserts that she became aware of the complaint on October 16, 2007. However, in her petition for reconsideration, she contended that she intended to pick up the complaint on October 13, 2007, but did not actually receive the complaint until the October 16, 2007.

The parties agree that, under Section 9(B) of the Arkansas Procedures Regulating Professional Conduct ("Procedures"), Donovan had twenty days after the complaint was served to file a response to the complaint or to request an extension of time to respond. The dispute between the parties is when the twenty-day period began to run. According to the Committee, it began to run on October 11, 2007, the day the Postal Service documentation shows that the complaint was delivered. Donovan contends that valid service of the complaint was never effectuated and, therefore, the twenty-day period never began running. She urges in the alternative, that even if the twenty-day period did begin to run, it did so on October 16, 2007, the day she contends that she received actual notice of the complaint.

On November 2, 2007, Donovan called the Committee's office and requested an extension of time to file her written response. She also sent the Committee a written extension request via facsimile transmission on the same day. On November 5, 2007, the Committee denied her request for an extension of time on grounds that it was received after the original twenty-day period had expired. According to the Committee, Donovan was required to respond to the formal complaint, in writing, within twenty days of October 11, 2007. It contended that Donovan's opportunity to respond, or to request additional time, was extinguished on October 31, 2007.

At its November 2007 meeting, Panel A of the Committee considered the formal complaint against

Donovan and suspended her license to practice law in Arkansas for twelve months, as a sanction for violating multiple rules of professional conduct. Panel A also ordered that she pay restitution to her former clients in the amount of $1,400 and assessed costs in the amount of $50.00. As a final point, Panel A issued a Reprimand, as a separate sanction for Donovan's failure to timely file a written response to the formal complaint.

The Committee sent a copy of Panel A's decision to Donovan by way of certified, restricted delivery, return receipt mail. The notice accompanying the decision included information regarding her right to file a petition for reconsideration with the Committee. Donovan failed to sign for the documents on two occasions, and the mailings were returned, as undelivered. On January 17, 2008, the Committee sent the documents to Donovan by First Class mail. The Committee included a proof of service, which it requested that Donovan sign and return. She did not do so.

On February 8, 2008, Donovan filed a petition for reconsideration of Panel A's decision, with her proposed response to the original complaint attached as an exhibit. Panel A denied the petition at its March 2008 meeting. The Findings and Order of Panel A were then filed with the Clerk of this court as a final order on April 7, 2008, and Donovan was granted a Stay of Suspension of her law license pending her appeal.

This court reviews an appeal from the Committee de novo. *See, e.g., Walker v. Supreme Court Comm. on Prof'l Conduct,* 368 Ark. 357, 362, 246 S.W.3d 418, 421-22 (2007). The de novo review looks to whether the factual findings were clearly erroneous, or whether the result reached was arbitrary or groundless. *Id.* We give due deference to the Committee's superior position to determine the credibility of the witnesses, and its findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Id.* The Committee's conclusions of law are given no deference on appeal. *Id.*

Section 9 of the Procedures is primarily at issue in the instant appeal. It requires that, when disciplinary action is taken against an attorney, the Committee shall "furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired." Ark. R. Regulating Prof'l Conduct § 9(A)(1) (2008). Following effective service, the attorney has twenty days to respond to the complaint in writing. *Id.* at § 9(B)(1). If the attorney does not respond, or request an extension of time to respond, within the required twenty days, the factual allegations of the complaint are considered admitted, and the attorney's right to a public hearing is extinguished.[3] *Id.* at § 9(C)(4). In

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[3] The formal complaint in the instant case stated, in bold, large font, on the front page: **WARNING: Failure to timely file a written response to this Complaint can carry**

(Continued on following page)

such circumstances, the attorney is entitled to file a petition for reconsideration within twenty days of service of the panel's decision to impose sanctions. *Id.* at § 9(C)(4)(a). The petition for reconsideration must state, on oath, compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the initial failure to respond. *Id.*

I. Untimely Request

The main thrust of Donovan's argument on appeal is that her request for an extension of time to respond to the formal complaint was timely because the complaint was never properly served on her. She contends that service was not perfected because the Committee did not receive a return receipt, signed by her, evidencing delivery of the complaint. Because of this, Donovan argues that the Committee should have granted her additional time to respond and that Panel A erred in imposing sanctions without considering her response, which was tendered after Panel A made its findings. She further contends that Panel A erred in failing to hold a hearing on the matter. The Committee responds, to repeat in part, that it was not required to obtain a signed receipt and that a properly served complaint was delivered to the appellant on October 11, 2007. As such, her

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substantial adverse consequences and penalties, including that all allegations in the complaint will be deemed admitted, and you lose your right to any public hearing after a ballot vote.

November 2, 2007 communication with the Committee, requesting an extension of the twenty-day time period to respond, was untimely. The Committee is correct on this point.

Throughout her briefs, Donovan cites this court, almost interchangeably, to Section 9 of the Procedures and Rule 4 of the Arkansas Rules of Civil Procedure ("ARCP"), as they pertain to service of process. Section 9 specifically provides that a complaint from the Committee may be served on a respondent attorney by "mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail." *Id.* at § 9(a)(2)(a).

Rule 4 of the ARCP, on the other hand, specifies the way in which service may be perfected in all civil cases. Rule 4 allows for service "by any form of mail addressed to the person to be served with a return receipt requested and delivery restricted to the addressee or the agent of the addressee." Ark. R. Civ. P. 4(d)(8)(A)(i) (2008). Rule 4 goes on to specify that service perfected by mail "shall not be the basis for the entry of a default or judgment by default unless the record contains a return receipt signed by the addressee or the agent of the addressee. . . ." *Id.* at 4(d)(8)(A)(ii).

As Donovan acknowledges, this court has consistently held that the practice of law is a privilege and not a right. *See, e.g., Cambiano v. Neal,* 342 Ark. 691, 701, 703, 35 S.W.3d 792, 799 (2000). As such, courts

cannot summarily restrict a lawyer's ability to exercise the privilege. *Ex parte Burton*, 237 Ark. 441, 445, 373 S.W.2d 409, 411 (1963). Nevertheless, it is well settled that any protections to a law license are subject only to the very lowest review under the Due Process and Equal Protection Clauses of the Constitution. *Cambiano,* 342 Ark. at 703, 35 S.W.3d at 799. This court has also held that the Committee is in the nature of an administrative agency and is not bound by the rules of the court. *See Sexton v. Ark. Supreme Court Comm. on Prof'l Conduct,* 299 Ark. 439, 446-47, 774 S.W.2d 114, 118 (1989). Thus, the Committee is not required to adhere strictly to the Rules of Evidence or the Rules of Procedure. *Id.*

Unlike Rule 4 of the ARCP, Section 9 of the Procedures does not require that the Committee produce a signed copy of the return receipt in order for it to act if the respondent attorney fails to respond within twenty days. In short, the language relied on by Donovan in Rule 4(d)(8)(A)(ii) of the ARCP is notably absent from Section 9 of the Procedures. Since the Committee is not required to follow the ARCP, Section 9 of the Procedures governs. Despite this, Donovan urges that Rule 4, while not controlling, is instructive to reach a fair result on appeal. We agree that there may be circumstances in attorney discipline cases where it is appropriate to look to the ARCP for guidance, but this is not one of those occasions. Rather, it is incumbent upon this court to apply the Procedures, which specifically apply to the

Committee, where they differ from the ARCP, as in the instant case.

We conclude that Panel A's finding that the Committee properly served Donovan with a formal complaint on October 11, 2007, is not clearly erroneous. Donovan did not respond, or request an extension of time, until November 2, 2007, which caused her response to be untimely according to the Procedures. Panel A, accordingly, acted within its authority in treating her failure to respond as an admission of the factual allegations in the complaint. We affirm the Committee on this point.

II. Request for Reconsideration

Donovan also contends that Panel A erred in denying her motion for reconsideration because of excusable neglect. The Committee answers that Panel A did not err because Donovan failed to present compelling and cogent evidence for why she did not timely respond to the formal complaint, as required by Rule 9(C)(4)(a) of the Procedures.

Panel A's findings in denying Donovan's petition for reconsideration will be upheld unless they are clearly against the preponderance of the evidence. *See Lewellen v. Supreme Court Comm. on Prof'l Conduct,* 353 Ark. 641, 646, 110 S.W.3d 263, 266 (2003). Moreover, as already noted, a panel of the Committee will grant a petition for reconsideration if the attorney presents compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify

the failure to respond within the required twenty-day period. Ark. R. Regulating Prof'l Conduct § 9(C)(4)(c). This court gives deference to the panel's superior position to determine the credibility of the evidence and the weight it is to be accorded. *See Lewellen,* 353 Ark. at 646, 110 S.W.3d at 266.

Donovan's petition for reconsideration in the instant case first alleged that her request for an extension was not untimely. As discussed in the first point on appeal, that argument is without merit. The petition for reconsideration also contained allegations regarding her various personal difficulties during the time in which the formal complaint was served. She states that her home was sold in a non-judicial foreclosure sale on October 2, 2007; that she had a doctor's appointment which resulted in her receiving an MRI; that she was in communication with the Judges and Lawyers Assistance Program with respect to her depression; that her sister-in-law was diagnosed with terminal cancer; and that her brother was diagnosed with skin cancer. On appeal, she makes a conclusory statement that "[s]urely illness requiring a MRI of one's brain, cancer in the family, and other factors of this magnitude will qualify as unavoidable casualty or circumstances, and excusable neglect."

While the circumstances in Donovan's life may have given her valid grounds for requesting an extension of the initial twenty-day response period if she had done so within that time period, we agree with Panel A that they do not present cogent and compelling evidence for why she failed to request the

extension before the twenty-day period elapsed. We hold that Panel A's finding that Donovan's personal circumstances did not present cogent and compelling evidence for her failure to respond was not clearly against the preponderance of the evidence.[4]

III. Mandamus

Donovan has also filed a petition for writ of mandamus directing the Committee to grant her petition for reconsideration or afford her a new hearing before an alternate panel or both.

A writ of mandamus is appropriate only when a petitioner shows a clear and certain right to relief sought in the absence of another adequate remedy. *Hanely v. Ark. State Claims Comm.*, 333 Ark. 159, 970 S.W.2d 198 (1998). More specifically, we have said that to be adequate, the alternative remedy must be "plain and complete and as practical and efficient to the ends of justice and its proper administration as the remedy invoked." *Id.* at 164, 920 S.W.2d at 200

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[4] In her reply brief, Donovan asserts that the Committee's brief failed to comply with this court's abstracting requirements in Supreme Court Rule 4-2. She argues that the Committee should have abstracted the April 5, 2007 hearing before Judge Taylor, rather than including the transcript in its Supplemental Addendum. However, the hearing transcript was part of Exhibit A, which also included Judge Taylor's letter referring Donovan to the Committee. As an exhibit, the Committee was permitted to include the transcript in its Supplemental Addendum. Ark. R. Sup. Ct. 4-2(a)(8) (2008).

(quoting *Gran v. Hale,* 294 Ark. 563, 745 S.W.2d 129 (1988)).

In the instant case, Donovan has such an alternative, adequate remedy in the form of an appeal, which is now before this court. For this reason, we deny the petition for writ of mandamus.

Affirmed. Petition for writ of mandamus denied.

MANDATE

AFFIRMED;

PETITION FOR WRIT OF MANDAMUS DENIED

STATE OF ARKANSAS
In the Supreme Court

Proceedings of January 15, 2009

08-804
ANN C. DONOVAN APPELLANT

V. An Original Action

SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT APPELLEE

This appeal was submitted to the Arkansas Supreme Court on the record of the Supreme Court Committee on Professional Conduct, Panel A, and briefs of the respective parties. After due consideration, it is the decision of the Court that the judgment of the Supreme Court Committee on Professional Conduct is affirmed and the petition for writ of mandamus denied for the reasons set out in the attached opinion.

It is also ordered that the appellant pay the appellee $186.00 for brief costs in the appeal.

IN TESTIMONY, that the above is a true copy of the judgment of the Arkansas Supreme Court. I, Leslie W. Steen, Clerk, set my hand and affix the seal this 26th day of February, A.D. 2009.

/s/ Leslie W. Steen
Clerk

Leslie W. Steen
Clerk

Office of the Clerk
Supreme Court of the
State of Arkansas
Arkansas Court
of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas
72201

(Filed Jan. 26, 2009)

[File date incorrect on original document.
The correct file date is February 26, 2009.
See courts.arkansas.gov/court_opinions/sc/
2009a/20090226/20090226.htm]

Bob Estes
Attorney at Law
One East Center Street, Suite 200
Fayetteville, AR 72701-5302

RE: 08-804. Ann C. Donovan v. Arkansas Supreme Court Committee on Professional Conduct

Dear Mr. Estes:

The Arkansas Supreme Court made the following orders today in the above styled case:

"Petition for rehearing is denied."

"Motion for stay of enforcement of judgment is denied without prejudice. See Arkansas Supreme Court Rule 5-3(c)."

Sincerely,

/s/ Leslie W. Steen, Clerk

Leslie W. Steen, Clerk

LWS:jko

cc: Stark Ligon